

No. 84-1482

Office - Supreme Court, U.S.

FILED

APR 16 1984

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In The

**Supreme Court of the United States**

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October Term, 1983

In the Matter of the Application of

CHARLES A. WEIL,

*Petitioner,*

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

*Respondents.*

*On Petition for a Writ of Certiorari to the New York Court of  
Appeals*

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**REPLY BRIEF FOR PETITIONER**

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**ARGUMENT**

1. Respondents completely ignore critical issues presented in petition for certiorari: whether the regulation is unconstitutional for:

- a. vagueness and indefiniteness;
  - b. overbreadth;
  - c. infringement on the first amendment right to communicate violations of law to a police officer;
  - d. infringement on the equal protection of the laws;
  - e. impermissible speculation whether other avenues of relief are available when constitutional issues of validity are involved;
  - f. infringement on the Sixth Amendment;
  - g. speculating on possible mootness of a constitutional issue undisputedly likely to recur.
2. There was misleading misconduct of respondent relative to the spurious prohibition issue *a fortiori* where constitutional issues are involved.
  3. There was impermissible evasion by the state courts of constitutional questions.
  4. Authorities cited by respondent are inapposite and distinguishable or actually supportive of petitioner's points.

Respondent's brief in opposition to petition for certiorari is a hodge podge of evasions, misleading misstatements, spurious issues and inapposite authorities: (References are to pages of said brief).

#### A. Evasions:

1. This Court's ruling in *INS v. Chadha* (Point V) at pp. 5, 12, 16 (twice) 17, 18, 19, 20, involving, as herein,

proceedings relative constitutionality of regulation of an administrative agency, rebutting argument at p. 8 of brief in opposition;

2. This Court's ruling, in *Demarest* and Point VIII of petition;

3. Equal protection clause (Point II of petition);

4. *People v. Boback* (Point III of petition) relative discovery, requirement in New York State, in matters of simplified information as accusatory instruments (*cf., infra*, Point III).

#### B. Misleading-Misstatements:

1. Quibble on distinction between matters criminal and penal in nature (pp. 2, 3) (neither fish, flesh nor good red herring);

2. Traffic jams v. violations of law, p. 1;

3. As if herein were a matter of content (p. 1, three times) and free speech rather, than communication, and obligation to report law violations (*Roviaro v. United States*, 353 U.S. 53).

C. Spurious issues [the prohibition writ mare's nest (pp. 8-10, of petition at pp. 1, 3, 4 (three times))].

D. It fails to answer how else petitioner could, in any recurrence (it dares not dispute the likelihood of Point IV of petition) communicate with a patrolman, than by prior indisputable arm signal, that was indisputably ignored.

Footnote at p. 16 of petition overlooked inadvertent sounding of horns on a sharp turn of the wheel, many of which have klaxon sounders on the wheel rim.

## I.

**As to Prohibition**

Having demolished beyond reasonable doubt two arms of the opinion

- a. the discovery aspect
- b. speculation relative mootng

the legality of the prohibition sham issue, was covered only by citations (p. 34 of petition) we will only quote from the two authorities:

If, however, a court acts without jurisdiction, or acts, or threatens to act in excess of its powers, and it affirmatively appears that this will be done in violation of a person's, even a party's, rights but especially constitutional rights, prohibition will lie to restrain the excess of power. *LaRocca v. Lane* (37 NY 575) at 581.

It is, rather, the means to prevent an arrogation of power in violation of a person's rights, particularly constitutional rights (see *Matter of Lee v. County Ct. of Erie County*, 27 N.Y. 2d 432, 437-438, 318 N.Y. 3d 705, 267 N.E. 2d 452). Thus the presentation of an arguable and substantial claim of such an excess of power generally results in the availability of a proceeding in the nature of prohibition (see *LaRocca v. Lane*, *supra*, 37 N.Y. 2d at p. 581, 376 N.Y.S. 3d 93, 338 N.E. 2d 606). It is immaterial to this basic determination whether the claim is determined adversely to the petitioner on the merits. That relief ultimately

might be denied does not preclude the proceeding. *Nicholson v. State Com'n. on Judicial Conduct*, 50 N.Y. 2d 606 at 609.

## II.

### As to Mootness

Likelihood of future recurrence of past harm either to plaintiff — and the probability that similar cases arising in the future will evade judicial review at 378. *The Mootness Doctrine in the Supreme Court*, 88 Harvard L.R. 773 at 378.

Where there is (any) reasonable expectation that a wrong will be repeated (383) citing *United States v. T. Grant*, 345 U.S. 629; 633.

The need to ensure that repeated conduct of a defendant does not evade judicial review, *supra*, 386 the court has accepted jurisdiction in order to forestall the possibility that the injury will recur at 388.

## III.

### Relative Discovery

The CPL 100.20 McKinney commentary states

The form prescribed by the commissioners permits a minimum amount of factual information, and therefore a defendant arraigned upon a simplified information is entitled as matter of right to the supporting deposition of the complainant police officer — citing *Peo. v. Key*, 45 N.Y. 2d 111. . . .

As with Stefanik, quoted in petition p. 13, petitioner takes up authorities cited by respondents that are inapposite, distinguishable, and/or support petitioner-appellant's points also Consolidated Edison PSC at p. 25 petition and Demarest at p. 33, *infra*, *Desena v. Gulde*:

if safety factors or health measures require zoning they must involve safety and health characteristics which relate to the land under regulation as under Point II of the petition.

So with noise regulation, it must involve noise characteristics which relate to reasonable noise regulation, per Point II, not overbroad bans. Likewise re: *Grossman v. Baumgarten* at 199. In which case there was compelling medical necessity — (per) judgment of eminently qualified physicians. There was also a question of standing. *Idem*, *Lighthouse Shores, Inc. v. Town of Islip*.

Then as to mootness: *Matter of Hearst v. Clyne*, the case was moot without likelihood of repetition and so with *Snap'n Pops v. Dillon*, declaratory judgment is available where constitutional question is involved.

In *New York Foreign Trade Zone Operators v. State Liq. Auth.* (285 N.Y. 272, 276) the court said "The remedy (a declaratory judgment) is available in cases where a constitutional question is involved.

So with *Watergate v. Buffalo Sewer* at 37:

The exhaustion rule however is not an inflexible one. It is subject to important qualifications. It need not be followed, for example when an agency's action is challenged as either unconstitutional . . .

and with *French v. Devine*

Exhaustion of administrative remedies is unnecessary where the claimant seeks to have a legislative act declared unconstitutional and administrative action will leave standing the constitutional question.

Likewise with *Ex parte Young* at 126

We must assume a decent respect for the States requires us to assume that the state courts will enforce every right secured by the Constitution. If they fail to do so, the party complaining has clear remedy for the protection of his rights, for he can come from the highest court of every right granted or secured by that instrument and denied by the state court.

*People v. Cruz*, clearly a matter *malum in se*, not *malum prohibita*; drunken driving and there was a scientific basis for the standard imposed.

*People v. Judtz, Idem*, toy pistol that looks real enough for holdup purposes.

*Defiance Milk Products*, no rational basis for overbroad ban.

*Matter of Hearst Corp. v. Clyn*, the question of law had already become moot and was unlikely to recur.

*DeFuria v. Odgers*, the question could not possibly recur.

*Younger v. Harris*, glaringly inapposite: relative power of a federal district court to enjoin proceedings in a state criminal

trial court, under state statute previously held constitutional (at p. 40); contrary I Stat. 335 and 28 U.S.C. §2283; not under 28 U.S.C. §§1271, 2201, 2204.

### CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Courts of New York State.

Respectfully submitted,

CHARLES A. WEIL  
*Petitioner Pro Se*